BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F902454

ZONA PINNOW, Employee	CLAIMANT
BENTONVILLE SCHOOL DISTRICT, Employer	RESPONDENT
RISK MANAGEMENT RESOURCES, Carrier	RESPONDENT

OPINION FILED SEPTEMBER 30, 2009

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JASON HATFIELD, Attorney, Fayetteville, Arkansas.

Respondents represented by CONSTANCE G. CLARK, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On September 9, 2009, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on July 8, 2009, and a pre-hearing order was filed on July 9, 2009. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The employee/employer/carrier relationship existed among the parties on February 21, 2009.

At the time of the hearing the parties agreed to stipulate that claimant earned sufficient wages to entitle her to compensation at the rate of $278.00 for total disability benefits and $209.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's left wrist and jaw on February 21, 2009.
2. Related medical.

3. Temporary total disability from February 21, 2009 through a date yet to be determined.

4. Attorney fee.

At the time of the hearing claimant indicated that the period for which she was requesting temporary total disability benefits would end as of April 21, 2009.

The claimant contends she sustained a compensable injury while working for respondent on or about February 21, 2009, at which time she fell while in the course and scope of her employment, breaking her left wrist and striking her jaw.

The respondents contend the claimant did not sustain an injury which arose out of or in the course of her employment. Respondents contend that the injury for which the claimant seeks benefits was incurred at a time when employment services were not being performed.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on July 8, 2009, and contained in a pre-hearing order filed July 9, 2009, are hereby accepted as fact.

2. The parties' stipulation that claimant earned sufficient wages to entitle her to compensation at the rate of $278.00 for total disability benefits and $209.00 for permanent partial disability benefits is also hereby accepted as fact.

3. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her left wrist and face on February 21, 2009.

4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

5. Claimant is entitled to temporary total disability benefits beginning February 22, 2009 and continuing until April 21, 2009.

6. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

FACTUAL BACKGROUND

The claimant was employed by the respondent as a bus driver. Claimant's normal work hours were from 6:00 a.m. until 9:00 a.m. and from 2:30 p.m. until 4:50 p.m. Claimant was paid $20.00 per hour for her normal bus driving.

Claimant also had the opportunity to sign up for extra bus driving in the form of field trips. For field trips the claimant was paid $8.50 per hour and for overnight field trips she was paid for sixteen hours a day regardless of the number of hours worked.

On February 21, 2009 the claimant drove a bus load of students to Little Rock for a DECA meeting. Claimant and the students were to spend two nights at the Doubletree Hotel. The bus claimant was driving on February 21 had four under-the-bus compartments for luggage, two on each side of the bus. Claimant testified that she was responsible for opening and closing these luggage compartments.

Claimant testified that on the night of February 21, she drove up to the hotel and stopped the bus in a pull-through lane to unload. She testified that after she got off the bus she opened the doors to the luggage compartments and went inside the hotel with a teacher to get keys to the hotel rooms. After she received her room key she was going back out to the bus when she tripped and fell over a concrete slab. Claimant testified that she fell face first into the back of the bus tire.

After parking the bus in the designated parking spot approximately three quarters

of a mile away, claimant returned to the hotel and an ambulance was called which took her to UAMS. At UAMS the claimant was given a splint for a fractured wrist.

After returning to Northwest Arkansas the claimant eventually came under the care of Dr. Mertz, an orthopaedic surgeon, who performed surgery on claimant's wrist in March 2009. Dr. Mertz eventually released claimant to return to work as of April 21, 2009.

Claimant has filed this claim contending that she suffered a compensable injury to her left wrist and face as a result of the fall on February 21, 2009. She seeks payment of related medical treatment, temporary total disability benefits from February 21, 2009 through April 21, 2009, as well as a controverted attorney fee.

ADJUDICATION

Claimant contends that she suffered a compensable injury when she tripped and fell on a concrete slab while returning to her bus on the night of February 21, 2009. Claimant's claim is for a specific injury identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

> (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
>
> (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
>
> (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
>
> (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury.

The primary issue in this case is whether claimant was performing employment services at the time of her fall on February 21. A.C.A. §11-9-102(4)(A)(i) defines a compensable injury as "[A]n accidental injury - - - arising out of and in the course of employment." A compensable injury excludes injuries which were inflicted upon an employee at a time when employment services were not being performed. A.C.A. §11-9-102(4)(B)(iii). The issue of whether an employee was performing employment services within the course of employment depends on the particular facts and circumstances of each case. *Texarkana School District v. Connor*, 373 Ark. 372, 284 S.W. 3d 57 (2008). An employee is said to be performing "employment services" when she is doing something that is generally required by her employer. *Wallace v. West Fraser South, Inc.*, 365 Ark. 68, 225 S.W. 3d 361 (2006). The test is whether the injury occurred within the time and space boundaries of the employment when the employee was carrying out the employer's purpose or advancing the employer's interest either directly or indirectly. *Id*. The critical issue is whether the issue of the employer was being directly or indirectly advanced by the employee at the time of the injury. *Id*.

In this particular case, the respondent contends that the claimant was not performing employment services at the time of her fall on February 21, 2009. In support of this contention respondent relies upon an answer claimant gave to an adjuster in a recorded statement on February 27. In the course of that recorded statement the adjuster asked claimant what she was doing at the time of her fall and claimant responded: "I was on my way back out to my bus to get my luggage out of my bus and take it up to my room, and then go park my bus." At another point during the recorded conversation claimant again indicated that she was going to her bus to get her luggage. Respondent contends

that because claimant was getting her luggage she was no longer performing employment services.

I find no merit to the respondent's contention, but instead find that claimant was performing employment services at the time of her fall. Claimant admitted at the hearing that she made those statements to the adjuster during her recorded statement. However, claimant went on to explain that she was simply summarizing what she was doing and that she simply did not go into great detail as to every activity she had to perform when she went back out to the bus. Claimant testified at the hearing that after she received her room key she was going back out to the bus to make sure that the luggage compartments were empty and latch them closed. Claimant testified that she also normally got on the bus and made sure that the students had taken everything off the bus before parking it. Claimant testified that this was particularly important on this trip since the bus had to be parked approximately three-quarters of a mile away from the hotel and it would not be easy for a student to retrieve something which had been left on the bus. Claimant testified that if something had been left on the bus and the teacher wanted her to get it she would have had to do so.

Claimant testified that at the time of her fall she had not checked the luggage rack, she had not closed and latched the doors to the luggage compartments, and she had not moved the bus to the designated parking area. Specifically, claimant testified that if she had only been going to get her luggage and not perform these other duties she would have approached the bus from a different area and would not have tripped and fallen.

Even if claimant's retrieving her luggage from the bus were considered personal in nature and not the performance of employment services, I would still find that this claimant was performing employment services at the time of her fall because she testified that she had other duties to perform in addition to retrieving her luggage. Claimant testified that she was responsible for making sure that all of the luggage had been removed from the

luggage compartments and that the luggage compartment doors were securely fastened. These job duties had to be performed before she could drive the bus to the designated parking area which was approximately three-quarters of a mile away from the hotel.

With respect to the recorded statement, I do not find it persuasive as evidence that claimant was not performing employment services at the time of her fall. Claimant testified at the hearing that she simply summarized what she was doing at the time of her fall and did not go into detail as to every activity she was going to perform when she reached the bus. After having had the opportunity to observe the claimant at the hearing I find her testimony to be credible and entitled to great weight. Based upon the testimony of the claimant which I find to be credible and entitled to great weight, I find that she was performing employment services at the time of her accident on February 21, 2009. At the time of the fall claimant was not only in the process of getting her personal luggage, but she was also in the process of checking the bus to make sure that all luggage had been removed, securing the luggage compartment doors, and she was still required to drive the bus to a designated parking area approximately three-quarters of a mile away. Based upon the foregoing evidence, I find that claimant was advancing the interest of her employer either directly or indirectly and was therefore performing employment services at the time of her all.

Furthermore, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her wrist and to her face as a result of the fall on February 21. Following this accident claimant was taken to UAMS where she was diagnosed as suffering from a fracture and given a splint. Claimant eventually returned to Northwest Arkansas and was treated by Dr. Mertz who performed surgery on the claimant's fractured wrist in March 2009. The x-rays and surgery confirming a fractured wrist are objective findings establishing an injury. Furthermore, the medical records indicate that claimant had bilateral eye bruising and she was diagnosed

as suffering from a head injury by Dr. Moffitt.

Based upon the foregoing evidence, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered an injury which arose out of and in the course of her employment with respondent; that the injury was caused by a specific incident identifiable by time and place of occurrence; that the injury caused internal or external physical harm to her body which required medical services or resulted in disability; and that she has offered medical evidence supported by objective findings establishing an injury.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. This includes the surgery which was performed by Dr. Mertz.

The injury to claimant's wrist is a scheduled injury. An employee who suffers a scheduled injury is entitled to receive temporary total disability benefits or temporary partial disability benefits during their healing period or until they returned to work, whichever occurs first, regardless of whether there is a total incapacity to earn wages. *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001). Here, I find that claimant remained within her healing period and that she had not returned to work from the date of her accident until she was released by Dr. Mertz to return to work as of April 21, 2009. Accordingly, claimant is entitled to temporary total disability benefits beginning February 22, 2009, the day after her compensable injury, and continuing until April 21, 2009, the date she was released to return to work by Dr. Mertz. Respondent has controverted claimant's entitlement to unpaid indemnity benefits.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury when she fell while working for respondent on February

21, 2009. Respondent is liable for payment of all reasonable and necessary medical treatment for claimant's compensable injury. Claimant is entitled to temporary total disability benefits beginning February 22, 2009 and continuing through April 21, 2009. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of $294.75.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE